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In the wording of the clause of termination it would be advisable not to subject it to the construction that an estate for life has been given, which upon the happening of bankruptcy or insolvency is defeated, but to throw the clause into the form of what is called a collateral limitation, as for instance the interest is given for life, or until bankruptcy, or insolvency, or judgment upon a creditor's bill.

All voluntary gifts should include, during the life of the donor, the right of revocation. This saves to the donor a right to withdraw his bounty when it becomes apparent, as is often the case, that he is mistaken in the object of his gift.

A. M.

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*Supreme Court of Indiana.*

STEVENS *v.* THE STATE OF INDIANA.

Upon an indictment for murder where the defence is insanity, the jury should acquit if they entertain a reasonable doubt as to the soundness of mind of the prisoner at the time of the homicide, although they believe he had judgment and reason sufficient to discriminate between right and wrong in the ordinary affairs of life. He is as much entitled to the benefit of a doubt on that as on any other material fact in the case.

An instruction that "if the jury believe that the defendant knew the difference between right and wrong in respect to the act in question; if he was conscious that such act was one which he ought not to do," he was responsible for his act, is erroneous.

This was an appeal from the Vigo criminal court. The appellant was indicted for murder in the first degree, and convicted. The defence was insanity. At the instance of the prosecuting attorney, the court instructed the jury that "in order to excuse a man from killing another, on the ground of insanity, it must appear to the satisfaction of the jury that he was either absolutely insane at the time of the act, so that he did not know the difference between right or wrong, or that he was laboring under some form of monomania by which he was irresistibly impelled by an uncontrollable will to the perpetration of the act; *but such monomania must be in relation to the act of killing, for if it is monomania upon some other subject,*

*it does not excuse a killing.* If a man becomes a monomaniac on account of the morbid state of his domestic affections, or if he becomes so on account of the morbid state of his religious feelings, in either case his moral sense is only affected by the cause of his disease; that is, he is only excused from the commission of crime so far as he acts under the irresistible influence of the particular monomania under which he is laboring; *and if, although laboring under either of said forms of monomania, he shall kill a man with premeditation, malice and purpose, he would be without excuse, and would be guilty of murder in the first degree.*"

"In order to excuse a man for the commission of a crime on the ground of monomania, *it must appear that the monomania had relation to the particular crime committed, and if it was monomania upon any other subject, it would be no excuse.*"

"When a man kills another *without having given any previous indications of insanity,* and afterwards so act as to appear to be insane, the jury should consider this fact to determine whether insanity is not simulated or pretended; and if they find it was pretended, it should not weigh anything in their decision of the question of guilt or innocence."

At the request of the defendant, the jury were instructed that "if they believed from the evidence that when the prisoner committed the act charged in the indictment, he was laboring under any irresistible and uncontrollable mental delusion, impelling him to do said act—that he was at the time of the perpetration of said killing in such a state of mind as to be unable to control his will and his actions in regard to the act so committed—then in judgment of law he was insane, and could not be guilty of the offence of murder charged in the indictment, and he is consequently entitled to a verdict of not guilty."

"If the jury believes from the evidence that at the time of committing the act charged in the indictment, the prisoner was moved thereto by an insane impulse controlling his will and his judgment—an impulse too powerful for him to resist—and said insane impulse arose from causes physical or moral, or from both combined, not voluntarily induced by himself, under

such circumstances the jury cannot find the defendant guilty as charged."

The defendant asked the following instructions: that "if the jury entertain a reasonable doubt as to the soundness of the mind of the prisoner at the time of the commission of the homicide charged, he is entitled to the benefit of that doubt, as he would be to the benefit of a doubt as to any other material fact in the case—it being, under the statute of this state, a necessary ingredient of the offence that the person charged shall, at the time of the commission of the offence, be of sound mind, and if the evidence shows that the prisoner, at the time of the commission of the act, was not of such sound mind, although the jury may believe he had judgment and reason sufficient to discriminate between right and wrong in the ordinary affairs of life even at the time of the commission of the offence, they cannot find him guilty." The court refused to give the instruction, as asked, but, over the objection of the defendant, gave it with this qualification: "If the jury believe, from the evidence, that the defendant knew the difference between right and wrong in respect to the act in question; if he was conscious that such act was one which he ought not to do; and if that act, at the same time, was contrary to the law of the state, then he is responsible for his act."

There was a motion for a new trial on the ground that the parts of the charge in italics were erroneous, and that the qualification of the instructions asked by the defendant was incorrect. The new trial was refused, and defendant appealed to this court.

The opinion of the court was delivered by

GREGORY, J.—It is undoubtedly the law as charged by the court below, that if the defendant was moved to the act by an insane impulse controlling his will and his judgment, then he was not guilty of the crime charged. And if the defendant was a monomaniac on any subject, it was wholly immaterial upon what subject, so that the insane impulse led to the commission of the act.

It is claimed that the instructions as to this point given by the court, at the instance of the state's attorney, were calculated

to mislead the jury; and two members of this court are of that opinion. It is clear that the instructions might have been put in a better form, but I have no doubt that they are correct law, as they were intended by the court to be understood, and particularly as explained by the court in the instructions asked by the defendant. But if this case turned upon that question, I should hesitate to determine that a jury might not have been misled by instructions, about the meaning of which there is a difference of opinion among the members of this court.

It is claimed that the court erred in the instruction in reference to simulating insanity after the commission of the act, in assuming that the defendant had given no previous indication of insanity. There was some evidence of previous indication of insanity, but we do not understand the instruction as making any such assumption. The instruction may not have been applicable to the case made, and may have misled the jury.

But we are clear that the court below erred in giving the *qualification* to the instruction asked by the defendant.

The statute provides that "if any *person of sound mind* shall purposely and with premeditated malice kill any human being, such person shall be deemed guilty of murder in the first degree:" 2 G. & H., p. 435, sec. 2.

The legislature have defined the meaning of the expression "person of unsound mind." It is provided that this phrase "shall be taken to mean any idiot, *non compos*, lunatic, monomaniac or distracted person:" 2 G. & H., pp. 573-4, sec. 1.

The great difficulty has been, in cases of partial insanity, to fix the standard of criminal responsibility. The leading case in this country is *The Commonwealth* v. *Rodgers*, 7 Metcalf, 500. Chief Justice SHAW, in his charge to the jury in that case, said: "The difficulty lies between these extremes in the case of partial insanity, where the mind may be clouded and weakened, but not incapable of remembering, reasoning and judging, or so perverted by insane delusions as to act under false impressions and influences. In these cases, the rule of law, as we understand it, is this: A man is not to be excused from responsibility, if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the

particular act he is then doing; a knowledge and consciousness that the act he is then doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of right and justice, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences; if he has a knowledge that it is wrong and criminal, *and a mental power sufficient to apply that knowledge to his own case,* and to know that if he does the act he will do wrong and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal acts."

As we understand this charge, it does not go the length of fixing the test "of a knowledge of right and wrong." It recognizes the necessity of a mental power sufficient to apply that knowledge, and act accordingly. The charge is by no means clear, and we think that it is not entitled to the weight usually awarded to it.

The law was much better put in *Commonwealth ex rel. Haskell* v. *Haskell,* Philadelphia Legal Intelligencer for Dec. 4, 1868, thus: "That the true test lies in the word power. Has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and avoid the wrong? Has the defendant, in addition to the capacities mentioned, the power to govern his mind, his body, and his estate?"

Indeed, there are very strong reasons for holding that the charge of Chief Justice PERLEY, in the *State* v. *Pike* (see American Law Review or January, 1870, pp. 245–6), is the true law on the subject. He instructed the jury "that the verdict should be not guilty, by reason of insanity, if the killing was the offspring or product of mental disease in the defendant; that neither delusion or knowledge of right and wrong, nor design or cunning in planning and executing the killing and escaping or avoiding detection, nor ability to recognize acquaint-

ances, or to labor, or transact business, or manage affairs, is, as a matter of law, a test of mental disease; but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury."

The argument that leads strongly to this conclusion is to be found in the able dissenting opinion of Judge DOE, in *Boardman* v. *Woodman*, 47 New Hampshire, 120. (See p. 146, *et seq.*)

It is not necessary for us to go this length in the present case.

In a criminal case, *the jury* must be satisfied, beyond a reasonable doubt, of the defendant's mental capacity to commit the crime charged. This is but an application of the general principle, that the criminal intent must be proved, as well as the act; that without a capable mind such intent can not exist, the very element of crime being wanting. Such terms as "criminal intent," "vicious will" and "use of reason" are used in a very broad and general sense, including the idea that the mind must be in such a reasonable condition as to be capable of giving a guilty character to the act. The will does not join with the acts, and there is no guilt when the act is directed or performed by a defective or vitiated understanding. So far as the person acts under the influence of mental disease, he is not accountable.

We wish in this case to be understood as simply holding that the qualification of the instruction asked by the defendant was not law, and for this reason the court below ought to have granted the defendant a new trial.

Judgment reversed.

ELLIOTT, J., was absent.

The exact point decided in this case is that it is erroneous to instruct a jury that "if the defendant knew the difference between right and wrong in respect to the act in question; if he was conscious that the act was one which he ought not to do, then he is responsible for his act;" in other words, that such knowledge is the sole test of legal accountability.

Any one familiar with the English decisions, must be painfully conscious how often this has been laid down as the law in that country during the past half century.

Thus in *Bellingham's case*, in 1812, 5 C. & P., 169, Sir JAMES MANSFIELD declared that in order to support the defence of insanity, it must be proved "by the most distinct and unquestion-

able evidence that the prisoner was incapable of judging between right and wrong; in fact, it must be proved beyond all doubt, that at the time he committed the atrocious act, he did not consider that murder was a crime against the laws of God and nature; *and that there was no other proof of insanity which would excuse murder or any other crime.*" Lord BROUGHAM said in the celebrated case of *McNaghten*, that such was his test of insanity: "he cared not what judge gave another test, he should go to his grave in the belief that this was the real, sound, and consistent test." This was in 1843: 10 Clark & Finn. 200. And this test is somewhat tenaciously adhered to in the more recent cases in England: see *Regina* v. *Davies*, 1 F. & F., 69; *Regina* v. *Burton*, 3 Id., 780; *Regina* v. *Leigh*, 4 Id., 915; *Regina* v. *Stokes*, 3 C. & K., 185. And many American courts have adopted the same rule: see *State* v. *Spencer*, 1 Zabriskie, 196; *U. S.* v. *Shultz*, 6 McLean, 121; *State* v. *Huting*, 21 Missouri, 476; and many other cases. No doubt this is *one* test, but is it the only one? Mental incapacity of knowing right from wrong would of course be a defence, but the error lies in supposing that nothing but such incapacity will suffice. The latter no more follows from the former, than does the conclusion that all animals are men because all men are animals. Capacity of knowing right from wrong is an intellectual test, purely an intellectual test. And if man was all intellect, that might be sufficient. But since he has emotions, passions, propensities, and, above all, a personal *will* that may become deranged, the intellectual test is not sufficient. If power to control his will is lost, not through passion, not through a want of desire to control it, but through want of *power*, arising from a settled *disease* of the mind, then he is not accountable. The power of *choosing* his conduct is as essential to criminal liability as to moral responsibility: see *State* v. *Windsor*, 5 Harrington, 512; *Commonwealth* v. *Mosler*, 4 Barr, 267; *Kleim's case*, 2 Am. Journ. of Ins., Jan. 1861, p. 261; *Scott* v. *The Commonwealth*, 4 Met. (Ky.), 227.

E. H. B.

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## *Supreme Court of Wisconsin.*

### JOHN C. SCHNEIDER, *v.* WILLIAM S. EVANS.

Where the owner of goods delivers them to a carrier for transportation through a number of separate but connecting lines, it is the general custom for each carrier to pay the back charges for freight, and the last carrier has a lien on the goods for the whole.

The first carrier guaranteed that the whole freight should not exceed a stipulated sum. The second carrier paid the charges of the first in full, and at the end of the route a lien was claimed for the whole freight, though it exceeded the guaranteed amount: *Held*, That though the shipper would be entitled to recover back the excess from the first carrier, yet the second carrier having